# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

PHIL AL-MAKI,

Defendant-Appellee.

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UNPUBLISHED
January 17, 2006

No. 263467
Oakland Circuit Court
LC No. 2004-196017-FH

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

The prosecution appeals by leave granted the trial court's order granting defendant's motion for a new trial and request for an evidentiary hearing with regard to his motion to suppress. We reverse on other grounds, and remand for entry of orders granting defendant's motion to suppress and dismissing the charges.

On September 18, 2003, police officer Michael Manderachia noticed defendant's vehicle improperly parked in a handicapped spot and he ran a LEIN check on the license plate. The information he obtained included that defendant had a suspended driver's license and that he had a concealed weapons permit. When defendant returned to his vehicle, Officer Manderachia approached defendant regarding the infraction and asked him if he had his gun with him. Defendant indicated that he had the gun in the center console of his vehicle and he gave the officer permission to retrieve the gun. Defendant was also patted down and placed in the patrol car although he was not under arrest. The officer returned to the patrol car with the gun and asked defendant where his driver's license and CCW permit were and defendant told him they were in his wallet located in his vehicle. The wallet was retrieved by another officer and then Officer Manderachia went into the wallet and pulled out defendant's driver's license. While looking for the license and permit, the officer noticed a lump in one of the credit card pockets inside the wallet. He did not know what the lump was so he looked inside the pocket and saw a little paper folder which looked like a "doper fold." Officer Manderachia proceeded to remove and open the paper folder at which point he found a white powdery substance that field tested positive for cocaine. Defendant was charged with possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and felony firearm, MCL 750.227b.

At the preliminary examination, the prosecution moved to bind over defendant. Defendant objected, and moved to suppress the evidence of cocaine on the ground that it was found during an unreasonable, warrantless search. Following briefing and oral arguments on the

issue, the trial court rendered its opinion holding that defendant only consented to Officer Manderachia retrieving his driver's license and CCW permit from his wallet. Therefore, the district court concluded, the police officer exceeded the scope of the consent by further inspecting the unidentifiable lump found in defendant's wallet which turned out to be cocaine. Accordingly, the motion to suppress was granted and the case was dismissed. The prosecution appealed the decision to the circuit court and the dismissal was reversed. Thereafter the matter was bound over for trial.

Subsequently, defendant moved in the circuit court to suppress the evidence and quash the information on the ground that the cocaine was obtained in violation of the Fourth Amendment, US Const, Am IV; Const 1963, art 1, § 11. Defendant argued that he only consented to a search of his wallet for his driver's license and CCW permit, and once they were obtained or determined not to be in the wallet, the search should have been concluded. The "lump" in the wallet was obviously neither the license or permit. The prosecution responded that the issue had already been properly decided and that the law of the case doctrine controlled. Following oral arguments on the matter the trial court denied defendant's motion, holding that the issue had already been ruled on and that, further, "once Defendant consented to the search of his wallet, any expectation of privacy was significantly reduced, enough to justify the examination conducted by the officer, as held in *People v Custer*, 465 Mich 319 (2001)."

The matter proceeded to a jury trial which resulted in defendant being found guilty as charged. Defendant then filed a motion for evidentiary hearing and for a new trial asserting several grounds, including that (1) the trial court arbitrarily denied his request for an adjournment of trial so that he could secure new counsel and, thus, wrongfully denied him his right to counsel of his choice, and (2) the trial court erred in refusing to grant an evidentiary hearing on defendant's motion to suppress the evidence obtained in violation of his constitutional rights. Defendant argued that the trial court was not bound by the law of the case doctrine with respect to the suppression issue because, although requested under MCR 6.110(D), no evidentiary hearing occurred. The court agreed with defendant and granted a new trial on the ground that, on balance, the factors to be considered with regard to adjournment requests favored defendant and, pursuant to MCR 6.110(D), the trial court granted an evidentiary hearing with regard to defendant's motion to suppress. Thereafter, the prosecution filed an application for leave to appeal to this Court which was granted.

On appeal, the prosecution argues that the law of the case doctrine prevents the trial court from considering the issue whether the cocaine should have been suppressed because the issue was already decided by the circuit court on appeal which reversed the district court's grant of defendant's motion to suppress.[1] Whether the law of the case doctrine applies presents a question of law that is reviewed de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

The law of the case doctrine "provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent

[1] We address the prosecution's second issue on appeal first because it is dispositive.

proceedings in the same case." *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). It is a discretionary doctrine and it is primarily applied so as "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). In civil proceedings, the doctrine applies whether or not the decision was correct. *Herrera (On Remand)*, *supra*. The doctrine is not, however, inflexible. *People v Cleveland Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981). It is well established that in criminal cases a trial court retains the authority to grant a new trial at any time to prevent an injustice. See MCL 770.1; *People v Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997). The doctrine also need not be applied where a prior decision was clearly erroneous. *Cleveland Wells*, *supra*. And, there are instances in which the doctrine must yield to a competing interest such as ensuring constitutional rights are protected. See *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110; 476 NW2d 112 (1991); see, also, *Bennett*, *supra* at 500. The doctrine also does not preclude reconsideration of an issue if there has been an intervening change of law. See *Ashker*, *supra*.

In this case, the trial court granted defendant's post-conviction motion for an evidentiary hearing on his motion to suppress the cocaine which the court had denied prior to trial commencing on the ground that the law of the case doctrine prevented further consideration of the issue. In granting the evidentiary hearing, the trial court appeared to conclude that MCR 6.110(D) required such a hearing before a motion to suppress could be decided. However, it is clear from review of the preliminary examination transcript that defendant's federal and state constitutional right against unreasonable searches and seizures was violated; therefore, an evidentiary hearing is not necessary. The law of the case doctrine, which is merely a practice of courts and not a limit on their power, will not be implemented so as to further delay justice and tax even more unnecessary judicial resources. See, e.g., *Locricchio*, *supra* at 109, 114-115; *Phillips (After Second Remand)*, *supra* at 36-37.

A search and seizure conducted without a warrant is unreasonable per se and violates the Fourth Amendment of the United States Constitution and art 1, § 11 of the Michigan Constitution unless the prosecution satisfies its burden that the search is within one of the specifically established exceptions to the warrant requirement. *People v Champion*, 452 Mich 92, 97-98; 549 NW2d 849 (1996); *People v Harold Williams*, 63 Mich App 398, 401; 234 NW2d 541 (1975). The exception at issue in this case is the consent exception. The prosecution has consistently argued that defendant consented to the search that resulted in Officer Manderachia finding a paper folder containing cocaine. After de novo review of this constitutional issue, we disagree and conclude that the district court had properly granted defendant's motion to suppress the cocaine and dismissed the case. See *People v Frohriep*, 247 Mich App 692, 696; 637 NW2d 562 (2001).[2]

[2] This Court may consider and resolve issues beyond those raised on appeal where justice so requires. See MCR 7.216(A)(7); *Frericks v Highland Twp*, 228 Mich App 575, 586; 579 NW2d 441 (1998).

"The scope of a consent search is limited by the object of that search." *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). Reasonableness is the decisive factor of the Fourth Amendment, which is construed liberally to safeguard the right of privacy. *People v Kaigler*, 368 Mich 281, 290; 118 NW2d 406 (1962), quoting *United States v Lefkowitz*, 285 US 452, 464-466; 52 S Ct 420; 76 L Ed 877 (1932).

> "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect." [*Mancik v Racing Comm'r*, 236 Mich App 423, 430; 600 NW2d 423 (1999), quoting *Florida v Jimeno*, 500 US 248, 251; 111 S Ct 1801; 114 L Ed 2d 297 (1991).]

Here, the undisputed facts revealed at the preliminary examination include that defendant was being detained for a traffic violation when it was determined by the police officer that he had a suspended driver's license and a CCW permit. After patting down defendant and asking him to sit in the back of the patrol car, the officer asked for and was granted permission to retrieve defendant's gun from his car. When the officer returned to the patrol car with the gun, he asked defendant for his driver's license and CCW permit. Defendant indicated that they were in his wallet in his vehicle and he gave the police officer permission to retrieve the wallet. After the wallet was retrieved by another officer, Officer Manderachia went into the wallet to find the driver's license and CCW permit. He found the driver's license but not the CCW permit. While looking for these items, however, Officer Manderachia testified that he "noticed there was a lump in one of the little pockets inside the wallet." He then "glanced inside and saw a little paper fold inside there." Because he thought it looked like a "doper fold," he pulled it out and opened it. Officer Manderachia admitted on cross-examination that the lump "didn't look like a credit card or an ID card or anything like that." In fact, he testified, "[i]t looked like there was something there that didn't belong there." Officer Manderachia further admitted that, based on the conversation he had with defendant, he understood that he had permission to retrieve defendant's driver's license and CCW permit from the wallet.

It is apparent from the record evidence that, under an objective reasonableness standard, defendant only consented to Officer Manderachia searching his wallet for his driver's license and CCW permit. Clearly a lump inside a little pocket in the wallet was neither item. And, Officer Manderachia testified that he understood that defendant consented only to a search of his wallet for those two items and that the "lump" did not fit that description; thus, his actions admittedly were not objectively reasonable. See *Jimeno*, *supra*. Officer Manderachia's actions violated both the federal and state constitutions and justifies the application of the exclusionary rule, the primary purpose of which is deterring such unlawful police conduct in the future. See *People v Stevens*, 460 Mich 626, 639-640; 597 NW2d 53 (1999). That defendant's expectation of privacy with respect to his wallet was somewhat diminished by his consent to look for his driver's license and CCW permit does not excuse the intrusion occasioned by the police officer ignoring or taking advantage of that limited consent. See *People v Custer*, 465 Mich 319, 334 n 4; 630 NW2d 870 (2001). Accordingly, the prosecution failed to establish that the cocaine was obtained from a reasonable search and seizure and the circuit court on appeal erred in reversing the district court's grant of defendant's motion to suppress and dismissal of the case. In light of

our resolution of this dispositive issue, we need not consider the prosecutor's second issue on appeal whether defendant was entitled to a new trial.

Reversed and remanded for entry of orders granting defendant's motion to suppress and dismissing the charges against defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Pat M. Donofrio